2012 IL App (1st) 102592-U

SECOND DIVISION
September 18, 2012

No. 1-10-2592

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 95 CR 24818
	)	
ANTHONY D. LEE, SR.,	)	Honorable
	)	Michele M. Simmons,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Harris, P.J., and Connors, J., concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant has not met the cause and prejudice test, the trial court did not err in denying him leave to file a successive post-conviction petition.

¶ 2 Defendant Anthony D. Lee, Sr., appeals from the denial of his motion to file a successive petition for post-conviction relief. On appeal, defendant contends that he has established cause and prejudice to file a successive petition asserting the same claim of ineffectiveness he raised in his initial petition, and argues that the initial post-conviction proceedings were fundamentally flawed because the circuit court and this court erroneously found that the issue was procedurally

defaulted. We find that defendant has not fulfilled the "cause and prejudice" test for the filing of a successive post-conviction petition and accordingly affirm.

¶ 3 Following a 1996 bench trial, defendant was found guilty of five counts of aggravated criminal sexual assault and one count of aggravated kidnapping. He was sentenced to an aggregate prison term of 100 years, which included an extended term of 60 years on three counts of aggravated criminal sexual assault, a consecutive extended term sentence of 40 years on the other two counts of aggravated criminal sexual assault, and a concurrent sentence of 15 years for aggravated kidnapping.

¶ 4 On direct appeal, defendant contended that the trial court had erred in denying his motion to quash arrest and suppress his statement and challenged the sufficiency of the evidence, specifically contending that there was no physical manifestation of a weapon presented at trial. We affirmed defendant's conviction and sentence. *People v. Lee*, No. 1-96-3069 (1998) (unpublished order under Supreme Court Rule 23). In the course of doing so, we set forth the underlying facts of the case. In brief, the victim, L.M., testified that about 1 a.m. on the date in question, she was walking to her sister's home when two men in a car pulled up, grabbed her, and forced her into the car, which they drove to Indiana. There, defendant went into a "liquor store or lounge," while codefendant stayed in the car and touched L.M. against her will. At some point, codefendant told L.M. where he worked and that he had "just left a club in Hammond." After defendant returned to the car and they drove to an unknown location, defendant ripped off L.M.'s clothing, struck her head and face repeatedly with his fist, and forced her to perform oral sex on codefendant. Codefendant forced L.M. to have vaginal intercourse, after which defendant directed him to "go in the trunk and get the nine." Codefendant returned with a gun, gave it to defendant, and then drove to another location. Defendant held the gun to L.M.'s head while he forced her to have vaginal intercourse and to perform oral sex on him. When L.M. realized defendant had released the gun, she struggled with defendant, managed to escape from the car, and ran up to a nearby house while defendant drove away.

¶ 5 Teresa Baragas testified that about 3 a.m. on the morning in question, she was woken by L.M. banging on her front door. L.M. had black eyes and other marks on her face, was naked, and was screaming that she had been raped. L.M. spent the night at a hospital. She subsequently identified defendant in a lineup.

¶ 6 Defendant testified that L.M. voluntarily entered his car; that she waited in the car while he and codefendant went into a liquor store/lounge together; and that he, codefendant, and L.M. drank alcohol and smoked marijuana together. He related that he became angry when L.M. put out a cigarette on the floor of his car, argued with L.M., and exchanged punches with her. According to defendant, he got out of the car and sat near the curb, drinking beer, while L.M. and codefendant stayed in the car. After a while, defendant drove to another location while L.M. and codefendant had sex in the back seat. When they stopped and codefendant got out of the car, L.M., who was naked, hit defendant in the eye, said, "[Y]ou bastards are going to pay for this," and ran from the scene. Defendant denied having any sexual contact with L.M. and denied having a gun.

¶ 7 In 1998, following our decision on direct appeal, defendant filed a *pro se* post-conviction petition, alleging, among other things, that his trial counsel was ineffective for failing to interview or call eight witnesses defendant had told him about, including Phillip Elston, Charlene Parker, Brian Massenburg, and Gayland Massenburg. Defendant attached affidavits from these potential witnesses and asserted that they "could have possibly exonerated [him] from the charges." In his affidavit, Elston related that between 3:30 and 4:00 a.m. on an unspecified date, he saw defendant sitting on a curb near his car, drinking beer, while a man and woman got into the back seat of the car. According to Elston, defendant told him his friend "pulled this female." Parker averred in her affidavit that between 1:00 and 1:30 a.m. on the date in question, she took a photograph of defendant, codefendant, and a third man in a lounge in Hammond, Indiana. Although the affidavit referred to the photograph as being attached, no photograph appears in the record. Brothers Brian and Gayland Massenburg stated in their affidavits that between 12:30 and

1:00 a.m. on the date after the date in question, they saw two men in a car matching the description of defendant's car near the area where the victim was abducted. According to the Massenburgs, the men stopped their car to talk to a white woman who was walking on the street. The woman got into the car, which drove off.

¶ 8 Counsel was appointed and filed a supplemental petition, asserting that defendant's sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The State filed a motion to dismiss, which was granted by the trial court on the grounds that the petition was "untimely and prohibited by SOL." Defendant appealed. We reversed and remanded for compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984). *People v. Lee*, No. 1-02-1707 (2004) (unpublished order under Supreme Court Rule 23).

¶ 9 After counsel filed a Rule 651(c) certificate, the State filed a supplemental motion to dismiss. Following a hearing on March 30, 2007, the trial court granted the State's motion and dismissed the petition "based on *res judicata* and untimeliness." On appeal, we affirmed based on a determination that the trial court correctly dismissed the petition as untimely. *People v. Lee*, No. 1-07-0914 (2008) (unpublished order under Supreme Court Rule 23). Our supreme court thereafter entered a supervisory order, directing us to vacate the portion of our order finding defendant's post-conviction petition to be untimely and directing us to review the trial court's dismissal based on *res judicata*.

¶ 10 Following our supreme court's directive, we withdrew our original order, but again affirmed the dismissal of defendant's post-conviction petition. *People v. Lee*, No. 1-07-0914 (2009) (unpublished order under Supreme Court Rule 23). In the course of doing so, we noted that defendant had raised claims of ineffective assistance of trial counsel and found his claims were forfeited because they related to information known before he filed his direct appeal and could and should have been raised at that time. *Id*. at 3.

¶ 11 Defendant filed both a petition for rehearing and a petition for leave to appeal, but both were denied.

¶ 12 In 2010, defendant filed a *pro se* motion for leave to file a successive post-conviction petition. In the petition, defendant alleged that his trial counsel was ineffective for failing to interview or call as witnesses Phillip Elston, Charlene Parker, Brian Massenburg, and Gayland Massenburg, who he asserted would have testified that the victim willingly got into his car and voluntarily remained with him and codefendant throughout the evening in question, and therefore would have raised questions about the victim's credibility. Defendant attached the same affidavits he had attached to his original petition, with the addition of a second affidavit from Phillip Elston. In the affidavit, Elston clarified that he had seen defendant on the date in question, and added that although he had written to defendant's attorney regarding his willingness to testify on defendant's behalf, he was never contacted by the attorney.

¶ 13 Defendant argued that he should be allowed to raise this claim -- which was included in his initial petition -- in a successive petition because the claim had not yet received substantive review due to the circuit and appellate courts' erroneous determination that it was procedurally barred. In this way, according to defendant's argument, the initial post-conviction proceedings were fundamentally deficient. Defendant argued that the affidavits supporting his claim were not included in the direct appeal record, and therefore, his claim of ineffectiveness was not procedurally forfeited.

¶ 14 The trial court denied leave to file, finding that defendant had not met the cause and prejudice test for filing a successive post-conviction petition. This appeal followed.

¶ 15 A trial court's decision whether to grant leave to file a successive post-conviction petition is controlled by statute. 725 ILCS 5/122-1(f) (West 2010). Because a trial court's compliance with statutory procedure is a question of law, our review is *de novo*. *People v. Spivey*, 377 Ill. App. 3d 146, 148 (2007).

¶ 16 The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. 725 ILCS 5/122-3 (West 2010). Any issues that were decided on direct appeal or in the original post-conviction petition are barred by the doctrine of *res judicata*, and issues that could

have been, but were not, raised in the original proceeding or original post-conviction petition are forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). However, a defendant may overcome these procedural hurdles if fundamental fairness so requires. *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2001).

¶ 17 Whether this fundamental fairness exception applies is determined by employing the "cause and prejudice" test contained in section 122-1(f) of the Act. 725 ILCS 5/122-1(f) (West 2010); *Pitsonbarger*, 205 Ill. 2d at 459. Under this test, a claim in a successive post-conviction petition is barred unless the defendant can show cause for failing to raise the claim in his original post-conviction proceeding and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2010). Specifically, a defendant shows cause by identifying an objective factor that impeded his ability to raise a specific claim during his original post-conviction proceedings, and shows prejudice by demonstrating that the claim he did not raise during the original post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2010).

¶ 18 On appeal, defendant contends that he has established cause and prejudice to file a successive petition asserting the same claim of ineffectiveness he raised in his initial petition because the initial post-conviction proceedings were fundamentally flawed in that the finding of the circuit court and this court that the issue was procedurally defaulted was "clear legal error" which prevented him from receiving review of his claim on the merits. Defendant asserts that he has shown prejudice because, due to pervasive legal error, he has not obtained review of the merits of his claim, and because the affidavits of the proposed witnesses demonstrate an arguable constitutional claim that he was denied the effective assistance of trial counsel.

¶ 19 Defendant acknowledges that because he is attempting to raise the same claim he made in an earlier petition, his case "presents a twist on the usual scenario in which a defendant has failed to raise a claim previously." In support of his position that he may establish "cause" by providing an explanation for why a claim is raised a second time, defendant relies upon a federal *habeas*

corpus case, *Campbell v. Blodgett*, 997 F.2d 512 (9th Cir. 1992). In *Campbell*, the Ninth Circuit held that a petitioner could show cause for bringing a petition that failed to present a new ground for relief by, for example, establishing that discovery of new facts or an intervening change in the law would warrant reexamination of the same ground for relief raised in an earlier petition. *Campbell*, 997 F.2d at 524. Here, defendant is not claiming that new facts or a change in the law justify review of his successive claim. Accordingly, *Campbell* does not support his position.

¶ 20 Nevertheless, even if we were to decide in defendant's favor as to cause, he has not shown prejudice so as to justify the filing of a successive petition. As noted above, defendant argues that he has shown prejudice in two ways. First, he asserts that he has been prejudiced because he has not obtained review of the underlying merits of his claim. This assertion more accurately goes to the cause portion of the cause and prejudice test. Defendant cannot make the same argument for cause as he does for prejudice.

¶ 21 Defendant's second assertion with regard to prejudice is that it is arguable that trial counsel's failure to present testimony from Elston, Parker, and the Massenburg brothers constituted ineffective assistance because these witnesses would have cast doubt upon L.M.'s version of events.

¶ 22 Defendant's position that a mere "arguable" claim of cause and prejudice is sufficient to obtain leave to file a successive petition has been expressly rejected by our supreme court in *People v. Walter Edwards*, 2012 IL 11711, ¶¶ 25-29; see also *People v. Green*, 2012 IL App (4th) 101034, ¶ 23 (the "first-stage standard has been flatly rejected by the supreme court [in *Edwards*] in the context of a successive petition"). In *Edwards*, our supreme court held that a successive post-conviction petition must be evaluated differently than a first-stage proceeding in an initial petition. *Edwards*, 2012 IL 11711, ¶ 25. In accordance with *Edwards*, this court has held that "[a] petition for leave to file a successive post-conviction petition is not a post-conviction petition and never advances to additional stages of review." *People v. Croom*, 2012 IL App (4th) 100932, ¶ 24. Thus, rather than presenting a "gist" or an "arguable" claim, a

defendant must make a "more exacting" or "substantial" showing of cause and prejudice to be granted leave to file a successive post-conviction petition. *People v. Wayne Edwards*, 2012 IL App (1st) 091651, ¶¶ 22, 32.[1]

¶ 23 The underlying claim presented in defendant's successive petition is one of ineffective assistance of counsel. Such claims are judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. If a case may be disposed of on one *Strickland* prong, this court need not review the other. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 24 Here, defendant argues that trial counsel was ineffective for not presenting the testimony of Elston, Parker, and the Massenburg brothers. He asserts that the proposed testimony of the Massenburg brothers that they saw a white woman get into a car with two men would have contradicted L.M.'s testimony that she was snatched off the street; that Parker's proposed testimony that defendant and codefendant were in a Hammond, Indiana lounge together would have contradicted L.M.'s testimony that codefendant held her against her will while defendant went into a "liquor store or lounge" by himself; and that Elston's proposed testimony that around 3:30 or 4:00 a.m. defendant was sitting on a curb near his car, drinking beer, while a man and woman got into the back seat of the car would have supported defendant's testimony that he

[1]We note that the pleading standard applicable to successive petitions subject to the cause and prejudice test – as opposed to petitions claiming actual innocence, as in *Walter Edwards* – is currently pending before the Illinois Supreme Court in *People v. Evans*, 2011 IL App (1st) 100391-U, *appeal allowed*, No. 113471 (Jan. 25, 2012).

waited outside the car, drinking beer, while codefendant and L.M. remained in the back seat of the car.

¶ 25 We find that defendant has failed to establish the prejudice prong of the *Strickland* test. Even if these four witnesses had testified at trial consistent with their affidavits, there is no reasonable probability that the outcome of the proceedings would have been different. At trial, L.M. testified that defendant and codefendant abducted her off the street, drove her to various locations, sexually assaulted her, threatened her with a gun, and beat her before she was able to escape and run to a nearby house for help. Teresa Baragas, a disinterested witness, testified that about 3 a.m. on the morning in question, she woke to banging on her front door. She answered the door to L.M., who was naked, had black eyes and other marks on her face, and was screaming that she had been raped.

¶ 26 The Massenburg brothers' affidavits reference the date following the date in question, and moreover, simply relate that they saw two men in a car matching the description of defendant's car talking to a white woman, who then "got into the rear of the car." Even if the affidavits had referenced the correct date, the brothers' proposed testimony does not establish that the men in the car were defendant and codefendant, that the woman who "got into" the car was L.M., or that L.M. was not forced into defendant's car that night. Similarly, Parker's proposed testimony is unhelpful to defendant, as the photograph she states is attached does not appear in the record. Additionally, L.M. testified that codefendant told her he had just left a club in Hammond. Therefore, Parker's proposed testimony could support L.M.'s version of events, as opposed to defendant's. Finally, Elston's affidavit relates to events that occurred around 3:30 or 4:00 a.m., a time period after Teresa Baragas placed L.M. at her front door, naked and beaten. Accordingly, his proposed testimony would not have helped defendant's cause.

¶ 27 Defendant has not shown that he suffered prejudice from trial counsel's failure to call the four witnesses he identified in his successive petition. Accordingly, his claim of ineffective assistance of counsel fails. As such, defendant has not met the cause and prejudice test, and the

trial court did not err in denying defendant's petition for leave to file a successive post-conviction petition.

¶ 28 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.